

35. ELECTION

35.1: Consent Agreements

See **UD #24-90.**

35.14: Consent Agreements – Waiver of Procedure [See also 09.6.]

UDs #5-77, #22-77, and #21-78.

35.21: Refusal to Consent to Election – Employer Refusal

See **UD #11-77.**

35.3: Conduct of Elections

See **UD #7-89.**

35.31: Conduct of Elections — Voter Eligibility Criteria

See **UD #5-89.**

35.311: Conduct of Elections – Voter Eligibility Criteria – Discharged or Resigned Employees

“[N]o employee who was a member of the proposed unit on the date of the filing of the petition is presently employed by School District No. 2, Dupuyer, Montana.... [The entire teaching staff – Mr. and Mrs. Edward Gierke – resigned on February 3, 1976 effective at the end of the school term.] In conformity with this Board’s rule **MAC 24-3.8(18)-S8180(4)(a)** which provides that the employees eligible to vote in an election are those who were within the unit on the date of the filing of the petitions excluding those employees who have voluntarily terminated their employment between the filing date and the date of the election, we have determined that there are no eligible voters to participate in a representation election.” **UD #8-76**

See **UD #8-91.**

35.312: Conduct of Elections – Voter Eligibility Criteria – Laid-Off Employee

“The ultimate question before the hearing examiner is whether nine challenged ballots ought to be counted in this decertification election.... The determination will be based on whether the nine employees who cast these ballots were within the bargaining unit on the date the first petition in this matter was filed, April 3, 1981.... Even though inclusion on the payroll on the date the petition was filed is usually a key factor in determining voter eligibility, it is not a mandatory

criterion to be applied without discretion. Due to the seasonal nature of these employees' work and the specific contract language pertaining to this situation, the hearing examiner concludes that these employees' pay status on the date the petition was filed is not controlling in this case." **DC #8-81**

35.315: Conduct of Elections – Voter Eligibility Criteria – Part-time or Temporary Employee

The NLRB has determined that “where the dual-function or part-time employee works a sufficient number of hours to share a substantial community of interest with other unit employees, the employee should be part of the unit and therefore allowed to vote in the election.... However, the rule is not sound nor does it promote the best interests of either labor or management if the dual-function employee [who has a special relationship to management, which can reasonably be said to lead to some degree of management loyalty] is allowed to vote in an election among unit employees.” **UD #18-79**

“Rule **24.26.644(2) ARM** states: ‘The composition of the unit is not a proper matter to be considered in a decertification proceeding. Eligible voters for any decertification election shall be those who are members of the bargaining unit at the time of the filing of the petition.’ ... [I]n accordance with rule **24.26.644(2) ARM**, hours of employment after April 3, 1981 (the filing date specified in the Notice of Election) cannot be considered qualifying for purposes of voter eligibility in this election.” **DC #8-81**

See also **UD #21-77**.

See **UD #8-91**.

35.32: Conduct of Elections — Election Mechanics

See **UDs #7-89 and #8-91**.

35.321: Conduct of Elections — Election Mechanics — Eligibility Cut-Off Date

“**ARM Rule 24.26.658** makes it clear that only those individuals who were employees within the unit on the date the petition was filed are eligible to vote in the election.” **UD #8-91**.

35.322: Conduct of Elections – Election Mechanics – Eligibility List

See **UD #5-77**.

See **UDs #5-89, #7-89, and #8-91**.

35.323: Conduct of Elections – Election Mechanics – List of Names and Addresses

“**MAC 24-3.8(18)-*S8108(4)(b)** provides, ‘At least 7 days prior to the election, the employer shall furnish to each labor organization which is party to the proceedings a list of names and addresses of the employees eligible to vote.’”
UD #5-77

In **UD #5-77**, “This Board adopted the reasoning of the NLRB in the **Excelsior Underwear, Inc., decision, 152 NLRB 1236, 61 LRRM 1217** ... that ‘access to employee names and addresses is fundamental to a fair and free election regardless of whether the employer has sent campaign propaganda to employees’ homes’ There was absolutely no attempt on the part of the City to comply with this Board’s rule [**MAC 24-3.8(18)-S8180**].” **UD #18-76**

See **UDs #5-89, #16-89, and #24-90**.

35.324: Conduct of Elections — Election Mechanics — Mail or On-Site Election

See **UDs #5-89 and #7-89**.

35.325: Conduct of Elections – Election Mechanics – Notice of Election

“The notices given for the elections concerned were adequate.” **UM #5-76**

See **UDs #5-89, #7-89, and #16-89**.

35.327: Conduct of Elections — Election Mechanics — Place, Time, and Date of Election

See **UDs #5-89 and #16-89**.

35.329: Conduct of Elections – Election Mechanics – Secrecy of Ballot

See **UD #21-77**.

35.330: Conduct of Elections – Election Mechanics – Timeliness

See **UDs #11-77 and #21-78**.

35.34: Conduct of Elections — Ballot Procedures

See **UD #16-89**.

35.37: Conduct of Elections – Challenged Ballots

“[C]hallenges made of certain ballots case in the election ... [were] irrelevant as two votes could in no way have altered the outcome of the election.” **DC #9-77**

See also **UDs #18-76 and #22-77** and **DCs #11-79 and #8-81**.

35.372: Conduct of Elections – Challenged Ballots – Right to Challenge

See **UDs #6-77 and #21-77**.

35.375: Conduct of Elections — Challenged Ballots — Processing Challenges

See **UD #24-90**.

35.4: Election Objection Procedures

See **UD #8-91**.

35.42: Election Objection Procedures – Time for Filing

“The Petitioners failed to timely challenge the election as required by **MAC 24-3.8(18)-S8260**.” **UM #5-76**

See **UDs #24-90 and #8-91**.

35.43: Election Objection Procedures — Content of Objection Petition

See **UDs #24-90 and #8-91**.

35.44: Election Objection Procedures – Stipulations

“The Board’s regulations allow informal conferences, much in the nature of a pre-trial conference, to be used to define issues in a contested case. **MAC 24.-3.8(18)-S810 (Rule 17)**. While I would like to dismiss the above two matters pro forma, I am compelled to address Complainant’s new contentions [raised for the first time in the Complainant’s Brief] because of the lack of a pre-hearing order or written stipulation defining the issue(s) in this case.” **EC #6-74**

35.48: Election Objection Procedures – Stay of Proceedings

See **ULP #20-78 Montana Supreme Court (1979)**.

35.5: Objections of Election (See also 72.22.)

“[T]he Board has promulgated certain regulations which show ... the Board’s intentions to insure public employees’ freedom of choice in a representative

election and the Board's concurrence with the principles of the General Shoe Doctrine. For example, **MAC 24-3.8(18)-S8260(12)** allows a party to 'file with the Board objections to the conduct of the election or conduct affecting the results of the election' and **MAC 24-3.8(18)-S8220(8)** prohibits electioning of any kind in a polling area – violation of the regulation being grounds for setting aside the election." **EC #6-74**

"The question here then is whether or not the requisite 'laboratory conditions' were present during the organizational campaign and election." **EC #6-74**

"A democratic election for a bargaining unit must stand if it goes unchallenged within the five (5) day period as required by our rules, until a proper decertification petition can be brought not more than 90 days nor less than 60 days before the present contract's [next] termination date.... This is mandatory for stability." **UM #5-76**

35.511: Objections to Election – Conduct Interfering with Election Choice – Proximity in Time to Election

See **DC #9-77**.

35.513: Objections to Election – Conduct Interfering with Election Choice – Matters Considered in Other Proceedings

See **DCs #9-77 and #5-78**.

35.515: Objections to Election – Conduct Interfering with Election Choice – Objections Involving Mechanics of Election

"There is no question that the location of the polling area [in the lunchroom] was not ideal. But unfortunately, in order to make a polling area accessible to the employees this Board is forced to accept areas which are not ideal. There is ... no testimony showing that the higher level of noise interfered with the election." **DC #10-79**

"Because the Notice of Election was not able to be posted for the length of time specified in **ARM 24.26.659**, and because the outcome of the election was changed as a result of an employee not properly following the voter instructions contained in the Notice of Election, the Employer requests that the results of the original election be set aside and a new election conducted." **UD #7-84**

"The objections of the Montana Education Association to the conduct of the decertification election at Western Montana College are without merit and are hereby dismissed." **DC #4-83**

See **UD #8-91**.

35.5212: Objections to Election – Conduct by Either Party – Pre-Election Propaganda – Employer Statement

See **DC #9-77**.

35.5214: Objections to Election – Conduct by Either Party – Pre-Election Propaganda – Misrepresentation Concerning Material

In its campaign literature, the Montana Public Employees Association (MPEA) wrote that “the dues difference is part of the reason [employees might have for preferring MPEA over AFSCME], but the big reason tends to be the national control of the unions and the fact that a majority of their [AFSCME’s] dues leave the state’.” If AFSCME had established that the statement was false, a new election may have been required. **UD #10C-74**

“In Warner Press vs. NLRB we find: ‘...only those misrepresentations which are material, made at a time which prevents effective reply, and are of a fact within special knowledge of the party making it, require that an election be set aside’.” MPEA asserted that “ ‘after months of delay you finally have a contract in your hands. Isn’t it coincidental that you would receive it just before the election.’ Obviously designed to cast doubt on the sincerity and attitude of the Retail Clerks union, this statement appeared on the day of the election, preventing as ‘effective reply.’ This statement is not, however, a misrepresentation of fact but an obvious, biased interpretation of an established fact which in no way is cause to set aside the election.” **DC #9-77**

In Hollywood Ceramics Company (1962), the National Labor Relations Board ruled that an “election should be set aside only where there has been a misrepresentation or other similar campaign trickery, which involves a substantial departure from the truth, at a time which prevents the other party or parties from making an effective reply, so that the misrepresentation, whether deliberate or not, may reasonable be expected to have a significant impact of the election. However, the mere fact that a message is inartistically worded and subject to different interpretations will not suffice to establish such misrepresentation as would lead us to set the election aside.” **DC #17-79**

“The Hollywood Ceramics test was adopted [by the Board of Personnel Appeals] in 1975 in Laborers International Union of North America, Local 1334 v. MPEA (**ULP #10-74**) and implicitly followed in In the Matter of **DC #9-77**.” **DC #17-79**

“Even taken together, these ‘inartistically worded’ bits of information are no obstacle to upholding this election. A certain amount of puffing is tolerable in any election campaign, and if there is some exaggeration of the facts in the

election issues, it is up to the opposing party to present its rebuttal. Indeed, the opposing party is just as free to appeal to the emotional sense among the voters by being vigorous and exerting a certain amount of exaggeration in its view of the issues presented the employees.” **DC #17-79**

See also **ULP #10-74**

35.5216: Objections to Election – Conduct by Either Party – Pre-Election Propaganda – Timing, Opportunity to Rebut

“The concern with this Board has been, just as it has been with the National Labor Relations Board in the private sector, to preserve employee free choice be invalidating an election only when pre-election propaganda is so misleading and the circumstances are such as not to allow an effective rebuttal that to uphold the election would not be substantially likely to represent true employee choice.” **DC #17-79**

See **DC #9-77**.

35.5218: Objections to Election – Conduct by Either Party – Electioneering within Restricted Time Period

“The Board of Personnel Appeal’s Notice of Election does not contain a rule or regulation in regard to electioneering by management or labor prior to the date set for election.... However, the Board’s practices closely parallel the practices and precedents established by the NLRB. Within that context electioneering is an acceptable procedure.” **UD #7-79** (Letter from Robert Jensen to Kenneth Wilson)

“[P]rolonged conversation by representatives of any party with prospective voters in the polling area ‘constitutes conduct which, in itself will invalidate an election’ [according to the National Labor Relations Board’s Mechelm rule].... But the rule does not apply to ‘conversations with prospective voters unless the voters are ... in the polling area or in line waiting to vote.’ The rationale behind the ruling is that the time immediately before the casting of a ballot ought to be that of the employees. This prevents any type of coercion or pressure at the last minute.” **DC #10-79**

35.5231: Objections to Election – Conduct by Either Party – Electioneering at or Near Polls – Oral Communication to Voters

“Had representatives of either the union or the employer engaged in prolonged conversation with these employees in the polling area prior to their voting, then I think, grounds would have existed for setting aside the election. See **Michem, Inc., 170 NLRB 362, 67 LRRM 1395 (1968)**. But the record ... does not establish this.” **UD #20-74**

35.53: Objections to Election – Conduct by Employer [See also 72.22.]

“No grounds exist for setting aside the election conducted by the Board of Personnel Appeals.” **EC #6-74**

“Analyzing each of the allegations, this hearing examiner concludes that the city was neutral and that the necessary laboratory conditions did exist.” **DC #10-79**

35.532: Objections to Election – Conduct by Employer – Discriminatory Treatment or Threat Thereof

“Although Slim Campbell was laid-off before an employee less senior than he, the County had not laid off by strict seniority in the past. In fact, in the winter of 1983-84, Campbell was kept on throughout the winter while more senior men were laid-off.” **ULP #2-85**

“Lay-offs will always have some effect on organizational campaigns, but all lay-offs are not prescribed by the act.” **ULP #2-85**

35.533: Objections to Election – Conduct by Employer – Equal Access Rules

“This Board does not want to place a union in the position of having to move to postpone an election in order to preserve a right guaranteed it by the rules of this Board.... The Teamsters were remiss in failing to notify this Board or the Employer that it had not received a list of the eligible voters ... [but that is] not sufficient for this Board to not grant the Teamsters’ Motion to set aside the election conducted....” Therefore, the Hearing Examiner ruled that “the representation election of June 30, 1977 ... be set aside and a new election be held.” **ED #18-76**

See also **UDs #5-77 and #21-78** and **ULP #36-77**.

35.534: Objections to Election – Conduct by Employer – Favoritism or Declaration of Union Preference

See **ULP #36-77** and **DC #9-77**.

35.537: Objections to Election – Conduct by Employer – Prediction of Detrimental Result of Unionization

See **UD #21-78**.

35.541: Objections to Election – Conduct by Employer – Conferral or Promises of Benefits

“The NLRB has held that: ‘the granting of employee benefits during the period immediately preceding an election is not per se ground for setting aside an election.... The burden of showing these other factors [that the time of the announcement was governed by factors other than the pendency of the election] is on the employer.” **International Shoe Corporation, 123 NLRB 682, 43 LRRM 1520 (1959). UD #20-74**

35.56: Objections to Election – Employee Conduct

“We cannot create a double standard for first-time elections. We must place on all voters the duty to become informed.” **UM #5-76**

35.6: Bars to Election [See also 31.5 and 32.14.]

See **ULP #3-82.**

See **DC #16-89.**

35.61: Bars to Election – Unfair Practices

“[T]he Board may schedule elections at its discretion, there is no rule relative to scheduling, and when [unfair labor practice] charges are pending it is the Board’s decision whether such charges are blocking. In **ULP #33-77**, the Board felt the charges were not blocking because of the time and ability to rebut and overcome any damage caused by the alleged actions on which the charge was based. No evidence exists that the laboratory conditions surrounding the election were not maintained.” **DC #9-77**

“The ‘laboratory conditions’ under which the Board of Personnel Appeals conducts a decertification election occur where there are no pending charges against the employer, of conduct constituting an unfair labor practice. The purpose of the Board of Personnel Appeals in seeking laboratory conditions is to accomplish a fair election and to determine the uninhibited desires of the employees.... In seeking the laboratory conditions, the Board of the Personnel Appeals is following the lead of the NLRB ... [by using] the ‘blocking charge’ rule to the effect that it will not conduct an election to determine the bargaining representative of a group where there is pending against the employer charges of unfair labor practices.” **ULP #20-78 Montana Supreme Court (1979).**

See also **UD #21-78 District Court (1978)** and **DC #5-78.**

35.8: Remedy [See also 01.29.]

“In her report, the investigator recommended that ‘the election in the matter of **DC #5-82**, held March 24, 1982, be considered null and void.’ There is case law authority from the National Labor Relations Board which would allow such a

recommendation to be implemented in a factual situation such as this.” **DC #5-82**

35.81: Remedy – New Election [See also 74.38.]

“This Board’s rule, **MAC 24-3.8(10)-S8089(11)(b)**, reads: ‘(b) after hearing the Board shall issue its determination as to the appropriateness of the clarification or modification petitioned for. If the clarification or modification petitioned for is found not be appropriate the findings and conclusion shall give specific reasons therefore. If the clarification or modification is found to be appropriate the Board shall schedule an election or pre-election conference.’ (emphasis added) ... We therefore must interpret the above quoted rule in question to be applicable to only those unit clarifications and modifications in which an election would properly be called for. We cannot logically interpret the rule to apply to all unit modification or clarification proceedings.” **UM #1-75**

“Local No. 45 was aggrieved by not receiving the names and addresses of eligible voters and accordingly is entitled to a new election.” **UD #18-76**

It was ordered “that the representation election of May 26, 1977 ... be set aside and a new election be held.” **UD #5-77**

“[T]he election in the matter of **DC #5-82** held March 24, 1982 is declared to be null and void.... [A] second election in this matter is to be held by the Board of Personnel Appeals as soon as practicable.” **DC #5-82**

“Because of the above objection, it is ordered a second election will be conducted....” **UD #7-84**

35.82 Remedy – Certification

See UD #10C-*74; **ED #6-74**; and **DCs #10-79 and #17-79**.